Office - Supreme Court, U. S.
FILED
JUL 12 1954
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,

Appellant,

v.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

REPLY BRIEF IN SUPPORT OF JURISDICTION

DAVID A. GASKILL,
1122 National City Bank Bldg.,
Cleveland, Ohio,
JEROME C. FISHER,
1122 National City Bank Bldg.,
Cleveland, Ohio,
EDGAR P. STOCKER,
1122 National City Bank Bldg.,
Cleveland, Ohio,
Counsel for Appellant.

THOMPSON, HINE AND FLORY,
1122 National City Bank Bldg.,
Cleveland, Ohio,
Of counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,

Appellant,

v.

JOHN W. PECK, Tax Commissioner of Ohio

REPLY BRIEF IN SUPPORT OF JURISDICTION

Appellee contends that a tax against the bank, on a base which includes its United States securities, is valid, because it is a tax against property of depositors, not against property of the bank.

Confronted by the fact that in the tax on shareholders on their shares of stocks, a bank is carefully given by statute, a right to reimburse itself from the shareholder, and that there is no such statute covering the tax here in question, appellee can only say that it does not require "great imagination to conceive of that Court's (the Ohio Supreme)" holding that a bank could have a right of reimbursement.

This question of reimbursement was argued at length by both sides in the Ohio Supreme Court. That Court made no claim that there was such a right to recover this tax from depositors. Instead the Court relied upon the very different argument that

> "Payment by the financial institution of the tax will always in effect amount to payment by those who are

> the beneficial owners of such intangible property. Such payment will necessarily reduce the amount which the corporation will have available for payment of interest to depositors or shareholders of withdrawable shares and which will be available for protection of their deposits or stock claims and for distribution to them in the event of liquidation of the corporation."

This latter argument was made to this Court in the case of *Home Savings Bank* v. *Des Moines*, 205 U. S. 503. In that case, the tax was expressly on shares of stock issued by a bank.

> "Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to individual shareholders."

The argument there was that, since the tax was on the shares owned by the shareholders, it was not a tax on the property of the bank but a tax on the shareholders; and that the bank could be compelled to pay such a tax because the value of the shares was reduced by the payment out of the bank's assets. This Court refused to accept that argument and held the tax invalid. It pointed out in its opinion (page 520), that such an argument would apply equally to all of the property taxes, which the states had attempted to compel banks to pay, and which this Court had held invalid.

Since this is true as to a tax levied against shares of stock in a bank, which are clearly property of the shareholder, how much more is it true in the instant case, where, we submit, there is no property or ownership in the depositor?

Here, as in the *Des Moines* case, the tax is levied against the bank and is to be paid by the bank.

By the reasoning employed by this Court in the *Des Moines* case, this tax is not one against owners of the bank, of which the bank is merely the collector; it is a tax against

the bank and therefore invalid. But there is an added reason why the facts in the instant case are even stronger than those in the *Des Moines* case. In that case, shares of stock did exist and were owned by the shareholders. Shares of stock are property. But in the instant case, we submit, there is no property in the depositors, other than their "deposits" to be taxed. Beyond their deposits, what do the depositors own? It is said that the bank's surplus gives them a margin of safety, a protection of their deposits against losses by the bank. This is true, and that is the reason why the Ohio statutes provide for the building up of surplus. But this protection is a benefit; to be benefited or protected is a different thing from ownership. In banks which have capital and shares and shareholders, the building up of surplus and undivided profits is a protection to the depositors, against possible future losses by the bank, just as it is in our instant case. The depositors benefit by the protection, but they do not own the property of the bank.

If a bank with capital and shareholders makes large profits on its loans and investments, it can afford to pay higher interest rates, to attract more deposits. So in a mutual savings bank, larger profits may make it possible to offer higher interest rates. But in neither case does this possibility give to the depositors of either the bank with share-capital or the savings bank, any property right or ownership in the property of the bank. Here again a beneficial result is not to be confused with ownership.

Appellant says in Part 4 of his brief that the depositors are so much identical with the bank that they are "liable to assessments to make up any losses sustained by the enterprise". May we point out that there is no basis whatever in any Ohio statute or decision for the assertion that depositors could be so assessed. Depositors are the creditors of the bank. It would seem absurd that they should be assessed in order to pay the assessment back to themselves.

These depositors have not, under the Ohio statutes involved, the slightest power or control over the bank. They have no votes; they are not "members". The only thing which they may possibly possess, different from the rights of a depositor in a share-capital bank, is the purely theoretical possibility, utterly remote in fact, that if the bank should be liquidated at some day in the unknown future, and if there should then be left any surplus after the completion of liquidation, then any such surplus might then be divided among depositors in proportion to their deposits.

But even this theoretical and improbable chance does not amount to a property right in that surplus, in today's depositor. If today's depositor draws out his deposit, as do 20,000 depositors every year, (Rec. p. 14), he ceases to be a depositor and ceases to have even a theoretical interest in the possible distribution of a surplus. If tomorrow, or 10 years from tomorrow, anyone opens a new deposit, he then becomes one of those to whom any surplus would be distributed, if ever there were a liquidation and there were any surplus left.

To say that a depositor is the owner of a fractional part of the property of the bank, so that he can be taxed on this ownership, as a property right, in the same way that the owner of a share of stock in a corporation can be taxed, is to disregard reality. We believe that this Court, in protecting the credit of the United States from inroads by the states, looks to substance.

This Court said in the *Des Moines* case:

> "All its (the law's) parts must be considered in the matter pursued by this Court in *New Orleans v. Huston* and *Home Insurance Company v. New York* with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect."

Appellee's brief says that appellant is asking this Court "to provide an easy tax windfall". We submit that the constitutional right that federal securities shall not be taxed by a state, is not an easy tax windfall and is not a windfall at all. The freedom of federal securities from taxation has been repeatedly held to be for the benefit of the federal government, not for the purchaser of the securities. It is vital to the credit of the United States, and to enable the United States to borrow money at low rates. The last sentence in the opinion in the *Des Moines* case is in point (page 521):

> "If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation, that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed, whenever they are owned by a corporation, and the national credit has no defense against a serious wound."

Respectfully submitted,

DAVID A. GASKILL,
1122 National City Bank Bldg.,
Cleveland, Ohio,

JEROME C. FISHER,
1122 National City Bank Bldg.,
Cleveland, Ohio,

EDGAR P. STOCKER,
1122 National City Bank Bldg.,
Cleveland, Ohio,

THOMPSON, HINE AND FLORY,
1122 National City Bank Bldg.,
Cleveland, Ohio,

Of counsel for Society for Savings in the City of Cleveland.

DATED:
July 1st, 1954.